

1 Q The Time Warner agreement, which
2 has already extended long term, will
3 necessitate a surcharge and should have NFL
4 specific language.

5 Now, you see that sentence?

6 A I do.

7 Q And what he means by that is that
8 the Time Warner contract requires you to
9 attribute the surcharge specifically to NFL
10 games, correct, sir?

11 You need to present that analysis.

12 A I am not sure.

13 Q Well, isn't --

14 A Time Warner had a very specific --
15 posed a very specific problem for Versus for
16 Outdoor Life because Time Warner has a long-
17 term contract that specifically said you can't
18 put sports, professional sports, programming
19 on Outdoor Life. So we went to Outdoor Life
20 in advance of bidding for the games. We went
21 to Time Warner and said to Time Warner, "We'd
22 like to change your contract." We gave them

1 financial consideration for changing the
2 contract, and then we were very specific about
3 what would happen should we get NFL games, one
4 of the points being that they would end up
5 being an equity owner in Outdoor Life.

6 So I think probably -- well, I'm
7 not sure what he's referring to, but I'm sure
8 it was in the language to change that contract
9 with Time Warner.

10 Q And you needed -- and Time Warner
11 wanted to know how much of that surcharge was
12 for NFL games, correct?

13 A No.

14 Q They did not ask you that?

15 A No. I think they wanted to know
16 what the surcharge would be.

17 JUDGE SIPPEL: Who was supposed to
18 get the equity interest? Would that be
19 Comcast getting an equity interest in the air?

20 THE WITNESS: No.

21 JUDGE SIPPEL: Or the other way
22 around?

1 THE WITNESS: If Time Warner
2 carried Outdoor Life with the games, they
3 would have the right to get [REDACTED] of the
4 network, [REDACTED]. That was sort of
5 an emolument because they would not naturally
6 want to get the games and pay more. So it was
7 a way to get them to revise their contract so
8 we could put the games on and they would take
9 them.

10 JUDGE SIPPEL: I see, I see. I'm
11 with you.

12 BY MR. PHILLIPS:

13 Q Now, looking at the first
14 paragraph right under Mr. Chandler's E-mail it
15 says, "In preparation for our meeting next
16 week, please find attached an OLN with NFL
17 model internal base case and more specifically
18 in the six-year incremental OCF table
19 beginning on Row 61 an analysis which attempts
20 to isolate the NFL specific factors in the
21 model and then allocates the rights fees by
22 year according to the net profit expected over

1 the term of the rights agreement."

2 Do you see that paragraph?

3 A I do.

4 Q If you turn to the next page and
5 look at the attachment, which is 97(a) --

6 MR. CARROLL: Object to the
7 attachment.

8 JUDGE SIPPEL: I agree. That's
9 mischaracterization. It's another document,
10 but it --

11 MR. PHILLIPS: The document which
12 we've attached. Is that fair, Your Honor?

13 JUDGE SIPPEL: Fair.

14 BY MR. PHILLIPS:

15 Q The document we've attached to
16 this starts with the -- up in the upper left-
17 hand corner says, "OLN with NFL Summary,"
18 correct?

19 A Un-huh.

20 Q And then following the reference
21 to Tab 61 from the E-mail, could you turn to
22 page 3 of 4 of the document that we've

1 attached?

2 A Yes.

3 Q If you look at Line 61 on that
4 document, right underneath it there's a box
5 that says -- and I realize it's a little hard
6 to read -- it says, "Incremental NFL impact in
7 new contract years."

8 A I'm sorry on page 3 for me there's
9 no 61.

10 JUDGE SIPPEL: Yeah, do you want
11 to use a Bates number?

12 MR. PHILLIPS: I'm sorry. It's
13 Bates No. 2333.

14 JUDGE SIPPEL: Two, three, three,
15 three.

16 MR. PHILLIPS: It's page 10, but
17 page 3 of 4. Unfortunately, there are a lot
18 of pages here.

19 JUDGE SIPPEL: There are.

20 THE WITNESS: Got it, got it.

21 BY MR. PHILLIPS:

22 Q And if you look at Line -- are you

1 there yet, Mr. Burke?

2 A I am.

3 Q Okay. And if you look at Line 61,
4 you go across, there's a box that starts that
5 says "Incremental NFL Impact."

6 A Yes.

7 MR. PHILLIPS: I'm sorry, Your
8 Honor. Am I ahead of you?

9 JUDGE SIPPEL: No, I'm just
10 catching up. I didn't realize they were front
11 and back, but I've got it now.

12 MR. PHILLIPS: Okay. I'm sorry,
13 Your Honor.

14 JUDGE SIPPEL: That's okay.

15 MR. PHILLIPS: I sometimes go too
16 fast.

17 BY MR. PHILLIPS:

18 Q It says, "Incremental NFL Impact,
19 New Contract Years." Do you see that, sir?

20 A I do.

21 Q And over there it also says, "NFL
22 Rights Accounting Analysis," correct, sir?

1 A Yes.

2 Q And then go down to Line 75. It
3 talks about rate PSPM attributable to NFL FYI,
4 correct?

5 A I see that.

6 Q PSPM, can you tell me what that
7 means?

8 A I believe that refers to "per
9 subscriber per month."

10 Q Okay. So this would be the rate
11 per subscriber per month attributable to NFL.
12 That's another way to read that, correct?

13 A I think what -- and I understand
14 the confusion here -- I think the idea was you
15 were analyzing Outdoor Life without the new
16 strategy and with the new strategy, and what
17 this refers to here is the increase in rates
18 that we would get if we adopted the new
19 strategy the linchpin of which was the NFL.

20 But if you go back to page 2326,
21 what you'll see if that under that scenario if
22 you look at the expenses for the channel, Line

1 19, you'll see that the expenses for the
2 channel go from [REDACTED] in fiscal '05 all
3 the way up to [REDACTED] two or three years
4 later, and that was not just the NFL. A lot
5 of those expenses were -- I think we had [REDACTED]
[REDACTED] for NASCAR, Major League
7 Baseball, everything else.

8 So a more accurate nomenclature
9 would be per sub per month lift from the
10 strategy that started with the NFL.

11 Q Mr. Burke, if you would, taking
12 the page that you've just pointed us to and
13 now turn the page, that analysis ends, and
14 then on the page numbered five at the bottom,
15 which is 2326, there is an Outdoor Life
16 Network base case, NFL market conclusive, and
17 that goes on, and then that spreadsheet turns
18 to end and then if we go back and keep going
19 to the spreadsheet I was pointing you to, Line
20 61, and I'd like to take you back to number 75
21 again, which is the right per sub per thousand
22 in NFL, and I'd just like to ask you, sir. If

1 you take Exhibit 160 that I showed you earlier
2 and the one that says NFL surcharge and you
3 take it out to 2011 and the surcharge in that
4 previous document is [REDACTED], the surcharge
5 in this document -- sorry.

6 The surcharge in the previous
7 document, sir, the one that's Time Warner with
8 2006 with NFL on OLN, has a surcharge of [REDACTED]

[REDACTED].

10 A The same number.

11 Q Right. And it's the same number
12 in this document, correct, sir?

13 A Yes.

14 Q You don't recall seeing this
15 document before though, sir?

16 A No, but I would -- no. I would
17 assume they were both prepared by Russ.

18 Q Did you see it in preparation for
19 your testimony today?

20 A This document? No.

21 Q Now, you've said that when my
22 partner, Mr. Schmidt, met with you and you

1 told him that there was more in surcharges
2 than just n, but I believe you told him at the
3 time that it was fair to say at least 50
4 percent of that surcharge was attributable to
5 be purchased in the NFL games rights, correct?

6 A You know, it's tough -- it's tough
7 to precisely do it because the idea here --
8 and I think it's behind a lot of your
9 questions -- we always felt that it was very
10 difficult to imagine getting people to pay a
11 large surcharge for eight games that occurred
12 during a month of the year, and that really
13 the right strategy, just as a matter of
14 business strategy was to take a fully
15 distributed network, and it was self-serving
16 because it happened to be our network, Outdoor
17 Life, that had programming 365 days a year and
18 add NFL games during the fall, but add hockey
19 during the winter, add baseball games during
20 the summer, add NASCAR during the seasons of
21 NASCAR so that that had what we would call
22 "must have" programming 12 months of the year.

1 And so the NFL was really the
2 foundation of that strategy, and really the
3 best way to start that strategy, but we felt
4 that that strategy needed to be completed to
5 really make the network attractive for other
6 distributors.

7 Q Mr. --

8 A So whether it was 50 percent or
9 40, in a way it almost doesn't matter. It was
10 clearly -- I'm definitely willing to say it
11 was the most important. It was the
12 foundational event, but whether it was 30
13 percent or 40 percent or 50 percent, it really
14 -- we were building something that was way
15 beyond the NFL Network, and therefore, you had
16 to look at that in its totality, not each
17 individual piece.

18 Q Well, now, when Mr. Schmidt
19 examined you in this proceeding on March 24th
20 in Philadelphia, do you remember talking to my
21 partner?

22 A I do.

1 Q He talks more slowly than I do,
2 and he asked you on page 214, Line 6, with
3 respect to that Time Warner document. He
4 said, "I asked you in looking at that document
5 if you could estimate for me the percentage of
6 the surcharge associated with the NFL Golf.
7 I think you said higher than 50 percent.
8 Could you be more specific? Between 50
9 percent and 100?"

10 And you said, "I can't."

11 And then he said, "Okay."

12 And then you offered, "I can't,
13 but I think it's fair to say the majority,
14 over 50 percent of it would be due the NFL."

15 Do you still agree with that?

16 A I think he asked me three or four
17 times to give him a precise number. I said it
18 was very hard to give a precise number, but
19 clearly the NFL was the most important and
20 probably represented the majority.

21 Q Have you ever worried, Mr. Burke,
22 that Comcast would move Versus or the Golf

1 Channel to a premium sports tier with narrow
2 distribution?

3 A No.

4 Q Never worried about that?

5 A No.

6 Q Have you ever worried that another
7 MVPD might do that?

8 A No.

9 Q You've never worried that another
10 MVPD might do that?

11 A No.

12 Q It wouldn't be a good thing in
13 your view of Versus or the Golf Channel got
14 tiered by other carriers, correct?

15 A That's correct.

16 Q Because you agree that tiering
17 reduces the network's number of subscribers,
18 correct?

19 A That's correct.

20 Q And reduced subscribership would
21 adversely affect the licensing revenue,
22 correct?

1 A Licensing and advertising.

2 Q Licensing and advertising revenue,
3 and by adversely affecting licensing and
4 revenue, you'd also adversely affect the
5 network's ability to secure content in a
6 competitive marketplace, would you not?

7 A Certainly could.

8 Q And it would therefore affect the
9 network's ability to compete with other
10 networks. Is that a fair statement?

11 A I guess that's a fair statement.

12 MR. PHILLIPS: One moment, Your
13 Honor.

14 I now at ten after six in the
15 evening, assuming that clock still has power,
16 Your Honor --

17 JUDGE SIPPEL: Yes.

18 MR. PHILLIPS: -- I'm done.

19 Thank you very much, Mr. Burke.

20 JUDGE SIPPEL: Thank you.

21 And Mr. Schonman.

22 MR. SCHONMAN: Good evening, Mr.

1 Burke.

2 THE WITNESS: Good evening.

3 MR. SCHONMAN: My name is Gary

4 Schonman. I'm co-counsel for the FCC's

5 Enforcement Bureau. Just a few questions for

6 you.

7 FURTHER CROSS EXAMINATION

8 BY MR. SCHONMAN:

9 Q Did there come a time when you
10 learned that the NFL had decided to license
11 the eight gate package to the NFL Network?

12 A Yes.

13 Q When was that?

14 A I don't recall the exact day. I
15 was down in Florida, I think it was, when I
16 got a call from Brian saying that Commissioner
17 Tagliabue had called him and told him that we
18 didn't receive the package.

19 Q Would that have been in January
20 2006?

21 A I believe so.

22 Q And Brian is Brian Roberts?

1 A Yes.

2 Q What was your reaction?

3 A A combination of disappointment
4 and a little bit of relief. I had sort of
5 assumed we weren't going to get it, you know,
6 just the body language the last week or two.
7 Disappointed because we spent so much time on
8 it; relief because the price tag would have
9 been steep, and it would have been a real --
10 you know, it was a big bet for the company to
11 do and all of the attendant distribution
12 issues, everything else.

13 So these was a side of me that
14 said, okay, we tried our best, we didn't get
15 it, and you know, kind of a mixed feeling.

16 Q Did you have any discussions with
17 Mr. Roberts about it?

18 A No, it was a pretty short
19 discussion, and I'm sure we talked about it
20 when I got back in town and, you know, sort of
21 discussed the fact that we didn't get it and
22 could we have done anything differently, but

1 nothing -- nothing life.

2 Q Did there come a time when you
3 learned that Mr. Roberts had had a telephone
4 conversation with the former NFL Commissioner
5 Tagliabue?

6 A I did.

7 Q When did you learn about -- and is
8 that the January 27th, 2006 conversation?

9 A He, Brian may have briefly
10 mentioned the phone conversation. I was in a
11 car, and I was traveling to the airport. I
12 don't really recall exactly, but either I
13 said, "Well, what was the gist of the
14 conversation," or when I came back I do
15 remember him filling me in on parts of that
16 conversation.

17 Q Do you know who initiated that
18 conversation between the other two gentlemen?

19 A I believe it was Paul called Brian
20 to tell him we didn't get the rights.

21 Q Is it your understanding that Mr.
22 Roberts learned in that phone conversation

1 that the NFL had made its decision?

2 A Yes.

3 Q Not before then?

4 A I don't think so.

5 Q What did Mr. Roberts tell you
6 about the conversation?

7 A Well, he said it was fairly brief.
8 He said Paul was sort of ambivalent. He said,
9 you know, "I'm not sure we made the right
10 decision here." It was sort of a tough
11 decision. There were owners that wanted to
12 give it to you, owners that didn't, and then
13 he had what I considered to be sort of a
14 peculiar thing that he said. He said, "Well,
15 maybe some of these owners need to learn the
16 hard way."

17 Q When you say "he," who are you
18 referring to?

19 A Paul Tagliabue.

20 Q The Commissioner.

21 A Yes. But I think, you know, from
22 my recollection, and I'm aware that Paul has

1 said that Brian said something that made him
2 feel threatened, but I did not get any of that
3 feedback when I talked to Brian after the
4 call. It was more sort of Paul realized that
5 we might be disappointed, told Brian it was a
6 tough decision, and you know, that maybe it
7 wasn't the -- it left the impression that he
8 didn't think maybe it was the right decision.

9 Q Did Mr. Roberts express any relief
10 about the deal having gone down?

11 A No, no. I think he was mostly
12 disappointed.

13 Q Did there come a time when he was
14 relating this telephone conversation to you
15 that he said he had told Mr. Tagliabue that
16 the NFL's relationship with the cable industry
17 is going to get very interesting?

18 A No. I obviously read that
19 subsequently, but he did not at the time.

20 Q Then there came a time when
21 Comcast decided to move the NFL Network to a
22 premium tier. When was that decision made

1 internally?

2 A Well, it was -- I would call it a
3 rolling decision, you know, where sort of
4 different people had different opinions. Most
5 people, I think, felt that we should tier it,
6 and I believe we had a couple meetings on it.
7 The thing that really forced the decision was
8 after the Adelphia deal when we got new
9 markets. New markets came into Comcast that
10 were Adelphia markets that I don't believe had
11 the NFL Network. The question was: what do
12 we do? Do we put the product on a digital
13 tier or do we put it on a sports tier?

14 So I don't recall exactly when
15 that decision was made.

16 Q Would it have been made almost
17 immediately after the NFL made its decision?
18 Was it a week? Was it months?

19 A No, I think it was months later.
20 You know, part of it was there was no need to
21 make that decision, and I think we thought we
22 had a very interesting test case because Time

1 Warner and most of the other cable companies
2 were not carrying the NFL Network and the
3 games were going to go on and we could watch
4 and see if Time Warner lost subscribers,
5 keeping the NFL Network on our digital tier
6 for that first season and then tier it after
7 the first season. You could almost have a
8 test case to see whether it was worth [REDACTED]

10 So I think we adopted that
11 strategy, and if Time Warner had or Cox or
12 Charter or any of the cable companies that
13 didn't carry it had said, "Oh, my gosh, we've
14 got a problem here. We're losing a lot of
15 subscribers," we might have changed our
16 mindset.

17 Q Do you recall any discussions at
18 all between you and any other individuals at
19 Comcast about getting back at the NFL,
20 retaliating, to use a word, for having lost
21 the eight game package?

22 A No. No, I think we don't -- we

1 don't operate that way. We're a very large,
2 rational company, and we make decisions on a,
3 you know, per decision basis, and if the NFL
4 Network was priced differently or had more of
5 what I would consider must have programming,
6 we would have carried it.

7 Q Does Comcast as a matter of
8 routine business make any of its decisions
9 based on what other cable companies are doing?

10 A Sure.

11 Q Does it ever make decisions in
12 collaboration with other cable companies?

13 A Not on what programming to carry
14 or what the price is, no. We're very careful
15 about that.

16 Q In dealing with any program
17 providers, does it collaborate with other
18 cable carriers, cable companies?

19 A There are instances where we use
20 an entity called In Demand, which buys pay per
21 view programming from the Hollywood studios,
22 and it is a -- as I understand it, it has

1 antitrust clearance. So it's a mechanism for
2 us when it makes -- when you really need to
3 bring the cable industry together for a
4 specific item, and we did use In Demand when
5 we dealt with Major League Baseball for the
6 out-of-market package.

7 But by and large, cable companies
8 operate separately and do programming deals on
9 a separate basis.

10 MR. SCHONMAN: Just a minute, Your
11 Honor, please.

12 (Pause in proceedings.)

13 BY MR. SCHONMAN:

14 Q Mr. Roberts, when -- I'm sorry.
15 Mr. Burke.

16 A Just promoted me.

17 Q Sorry.

18 A I'll take it.

19 Q When NFL counsel was examining you
20 a few minutes ago, he asked you what your
21 reaction would have been, I think, if I'm
22 characterizing this properly, what your

1 reaction would have been if other cable
2 carriers had moved the Versus Network up to a
3 premium tier. Do you recall that?

4 A Yes.

5 Q And your reaction was it would
6 have been a negative move from your
7 perspective.

8 A That's correct.

9 Q And what's because it would have
10 affected advertising revenues and distribution
11 and --

12 A Affiliate, affiliate fees as well.

13 Q Were you aware that when the
14 decision was made or being considered among
15 those in Comcast to move the NFL Network to a
16 premium tier that that would be viewed as an
17 adverse move by the NFL?

18 A Yes, certainly.

19 Q Did you have any expectation about
20 what type of reaction you would get?

21 A I certainly assumed that the NFL
22 would advertise and take out newspaper ads, et

1 cetera, and try to pressure us to not do it,
2 probably go to Washington and talk to elected
3 officials, et cetera.

4 Q You were prepared to take that
5 risk?

6 A I think it comes with the -- you
7 know, they had demonstrated that that was
8 their reaction with Time Warner, and it was --
9 at the time I think they were suing or
10 probably around the timetable suing Charter
11 and Dish and a number of people. So we
12 expected a sharp elbow response.

13 MR. SCHONMAN: No further
14 questions, Your Honor.

15 JUDGE SIPPEL: I just have a
16 question. It came to pass that for a variety
17 of reasons, and you know, you've given them
18 and other people have given them, but
19 eventually the decision was made to put NFL
20 Network up on the sports tier. Now, exactly
21 how as it -- what was the dynamics for doing
22 that?